

No. 15798

United States
Court of Appeals
for the Ninth Circuit

CLYDE PHILP,

Appellant,

vs.

SAM MACRI, PAULINE MACRI, JOSEPH
MACRI, ELEANOR MACRI, DON R.
MACRI KATHLEEN N. MACRI, HERMAN
HOWE and VIOLA B. HOWE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Howe.

In the United States District Court for the
District of Western Washington

No. 4334

CLYDE PHILP,

Plaintiff,

vs.

SAM MACRI and PAULINE MACRI, Husband
and Wife; JOSEPH MACRI and ELEANOR
MACRI, Husband and Wife; DON R. MACRI
and KATHLEEN N. MACRI, Husband and
Wife; CONTINENTAL CASUALTY COM-
PANY, a Corporation, and HERMAN HOWE
and VIOLA B. HOWE, Husband and Wife,

Defendants.

COMPLAINT

Comes now the plaintiff and by way of first cause
of action against the defendants, and each of them,
complains and alleges as follows:

I.

That the plaintiff is a resident of Lima, Peru.

II.

That the defendants Sam Macri and Pauline
Macri are husband and wife; Joseph Macri and
Eleanor Macri are husband and wife; Don R. Macri
and Kathleen N. Macri are husband and wife, and
Herman Howe and Viola B. Howe are likewise hus-
band and wife.

III.

That all of the individual defendants herein are residents of Seattle, King County, Washington, and live within the jurisdiction of the United States District Court, for the Western District of Washington.

IV.

That the defendant Continental Casualty Company, is a corporation organized under the laws of the State of Indiana, is doing business in this state, and doing business within the jurisdiction of this court.

V.

That on or about May 1, 1947, in Civil Actions Nos. 246, 250, 251, 255, 257 and 267 in the District Court of the United States for the Eastern District of Washington, Southern Division, judgments were entered in favor of the United States of America for the use and benefit of the following use plaintiffs: M. C. Schaefer, H. H. Walker, Inc., J. W. Morrison Company, Union Concrete Pipe Co., Inc., a Washington corporation; Yakima Cement Products Company, a corporation; and Walton Lumber Company, a corporation, in the total sum of \$87,828.81, plus interest, carrying attorney's fees therefor in the sum of \$2,825.00 and costs against the Defendants Sam Macri, Joseph Macri and Don R. Macri, copartners, and Continental Casualty Company, a corporation. The action of use plaintiffs against this plaintiff and A. J. Goerig was dismissed without costs, but judgment in various sums was given

to Defendant Continental Casualty Company against Sam Macri, Don Macri and Joe Macri, this plaintiff and A. J. Goerig, copartners and joint venturers, with attorneys' fees.

VI.

Plaintiff alleges that prior to the 11th day of December, 1943, said Sam Macri, Joe Macri and Don Macri were copartners engaged in the construction business, and that at the same time said A. J. Goerig and this plaintiff were also copartners engaged in such construction business, and that on said date said partnerships entered into a certain written agreement under which said partnerships agreed, among other things, to engage in certain construction projects as joint venturers under the name and style of Macri & Company, and that on or about May 18, 1944, as one of the joint ventures so agreed to be undertaken by said partnership, said parties, under such name of Macri & Company entered into contracts with the United States of America, through the Department of the Interior, known as Specifications No. 1062 and No. 1068 of the Roza Division of the Yakima Project, Washington, wherein and whereby said partnerships contracted to furnish materials and perform work in accordance with the requirements of said contracts; that on said 18th day of May, 1944, to secure faithful performances of said contracts and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of said project, said partnerships, as Macri & Company, as principal, and Continental Casualty

Company, as surety, made, executed and delivered to the United States of America, as obligee, a performance bond or undertaking in the principal sum of \$84,833.75, conditioned, among other things, that if said principal should promptly make payment to all persons furnishing labor and materials for said project, said bond would be void, otherwise to remain in full force and effect; that thereafter, and on the 15th day of July, 1944, said partnerships, and the individual members thereof, entered into a certain written agreement terminating certain of the joint ventures entered into pursuant to said Joint Venture Agreement of December 11, 1943, under which agreement of termination it was agreed, among other things, that said Sam Macri, Joe Macri and Don Macri, as copartners as Macri & Company, should take over and complete and perform such contracts covering specifications No. 1062 and No. 1068 as expeditiously as possible and as required by the contract obligations, and that in the event the said Sam Macri, Joe Macri and Don Macri should sustain any financial loss in respect to the performance of said contracts, then when said loss was ascertained and determined, said Clyde Philp and A. J. Goerig should pay to said Sam Macri, Joe Macri and Don Macri fifty-two and one-third (52 $\frac{1}{3}$) per cent of such loss, if any; that a true copy of said agreement of termination of said joint ventures is hereto attached, marked Exhibit A, and by reference made a part of this complaint to the same effect as though fully set forth herein.

VII.

Plaintiff alleges that thereafter said Sam Macri, Joe Macri and Don Macri, as such copartners, did take over the performance of said contracts, but that in the performance of the work thereof, they failed and neglected to carry on the work expeditiously and in a workmanlike manner, but permitted the same to be delayed without reasonable cause and great cost and expense, and performed large portions of said work in a careless manner, and not in accordance with the requirements of said contracts, requiring any replacements of such work at great cost and expense and failed and neglected to pay for labor and materials furnished by others to whom they had subcontracted portions of the work, and particularly in that they failed and neglected to pay the amounts to the above-named use plaintiffs for labor and materials furnished for said project, and by reason thereof, said Civil Actions Nos. 255 et al., as listed above were instituted in said District Court of the United States for the Eastern District of Washington, Southern Division, in the name of the United States of America for the use and benefit of said use plaintiffs against Sam Macri, Joe Macri, Don Macri, A. J. Goerig and this plaintiff, and Continental Casualty Company, resulting in the judgments and judgments over described in paragraph V of this complaint.

VIII.

In these actions instituted by the use plaintiffs, A. J. Goering and this plaintiff demanded an ac-

counting from Sam Macri, Don Macri and Joe Macri, copartners and joint venturers. This the Plaintiffs Macri refused or neglected to furnish and as a result the court dismissed the cross-complaint which the Defendants Macri had instituted against A. J. Goerig and this plaintiff as copartners and joint venturers and gave the use plaintiffs judgment against Sam Macri, Joe Macri and Don Macri and Continental Casualty Company, but dismissed the use action against A. J. Goerig and this plaintiff. However, the court gave judgment over in favor of Continental Casualty Company against Sam Macri, Don Macri, Joe Macri, Clyde Philp (this plaintiff) and A. J. Goerig, copartners and joint venturers doing business as Macri & Company.

IX.

Plaintiff alleges that thereafter said Continental Casualty Company settled and discharged said judgments in favor of the United States of America for the benefit of the use plaintiffs in said actions, as above described, and thereby became entitled, as subrogee, to enforce its said judgments over in said action against said Sam Macri, Joe Macri, Don Macri, A. J. Goerig and this plaintiff, and that thereafter, on divers dates unknown to this plaintiff, said Continental Casualty Company, by attachment, garnishment, execution and other legal proceedings, recovered of this plaintiff, A. J. Goerig, Sam Macri, Joe Macri and Don Macri divers sums of money on its said judgments over and

upon certain other judgments over, hereinafter described, in partial satisfaction thereof, the total amount so recovered by said Continental Casualty Company being unknown to this plaintiff, but which is known to the defendants herein and said Sam Macri, Joe Macri and Don Macri, and which this plaintiff is informed and believes and alleges amounted to at least \$17,480.28, but that this plaintiff has no information as to which of said judgments over said amounts were applied, and further alleges that said judgments over in said Civil Actions have been partially satisfied by the amount of said payments properly applicable thereto, and that thereafter, at a date unknown to this plaintiff, said Sam Macri, Joe Macri and Don Macri settled and discharged all remaining liability to said Continental Casualty Company under said judgments over, by the payment of certain amounts of money thereon, the amount so paid unknown to this plaintiff, but that in lieu and instead of having said judgments satisfied and discharged of record, caused said judgments to be assigned to the Defendant Herman Howe herein, for the purpose of having said Defendant Howe attempt to collect said judgments and attorneys' fees in full from this plaintiff without any credit for the use and benefit of said Sam Macri, Joe Macri and Don Macri, and plaintiff further alleges that the Defendant Howe herein has no interest in said judgments, and the collection thereof, except as an agent of said Sam Macri, Joe Macri and Don Macri.

X.

That the Defendant Herman Howe, acting for and on behalf of the Defendants Sam Macri, Don Macri and Joe Macri, caused or induced the Defendant Continental Casualty Company to assign to him the judgments taken by Defendant Continental Casualty Company in the United States District Court for the District of Washington, Eastern Division, against Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, copartners and joint venturers, for which assignment the Defendant Herman Howe paid no consideration, (the small consideration being advanced by Defendants Sam Macri, Don Macri and Joe Macri).

XI.

That thereupon the Defendant Herman Howe, acting for and on behalf of his principals, Sam Macri, Don Macri and Joe Macri, brought an action against the plaintiff in the Supreme Court of the country of Peru in order to enforce the collection of such judgments mentioned above from this plaintiff.

XII.

That in the Supreme Court of the nation of Peru one resisting a judgment transferred there cannot show that, as in this instance, the judgment sued upon is actually owned by a partner and joint venturer and arose out of a joint venture or partnership in which there has been no accounting.

XIII.

That the said Sam Macri, Joe Macri and Don Macri are the real parties in interest, and are proper, necessary and indispensable parties to this action.

XIV.

Plaintiff alleges that under the terms and conditions of said agreement terminating said joint venture, this plaintiff and A. J. Goerig are jointly but conditionally liable to said Sam Macri, Joe Macri and Don Macri only to the extent of fifty-two and one-third (52 $\frac{1}{3}$) per cent of any loss sustained by said Sam Macri, Joe Macri and Don Macri in the performance of said contracts covering specifications No. 1062 and No. 1068, when such loss, if any, is ascertained and determined, provided that the performance of said contracts by said Sam Macri, Joe Macri and Don Macri was performed in a proper and workmanlike manner as expeditiously as possible, and as required by their contractual obligations; that although duly demanded by this plaintiff and said A. J. Goerig, said Sam Macri, Joe Macri and Don Macri have failed, neglected and refused to furnish any accounting of their receipts and disbursements on said contracts, and by reason thereof, the profit or loss thereon, if any there be, has not been determined or ascertained, and by reason thereof their action on the judgments is prematurely brought.

XV.

That the Defendant Herman Howe, acting for and on behalf of the Defendants Sam Macri, Joe

Macri and Don Macri, brought an action in the United States District Court in Idaho for the Eastern Division, being entitled Herman Howe, Plaintiff, vs. A. J. Goerig, Defendant, cause No. 1772, which file is made part of these pleadings as though fully set forth herein and incorporated herein by reference.

XVI.

That in this action before the United States District Court of Idaho Herman Howe, the defendant in the present action and the plaintiff in Idaho, although acting for and on behalf of the joint venturers, defendants herein, Sam Macri, Don Macri and Joe Macri, set forth the judgments resulting from the joint adventure between Sam Macri, Don Macri and Joe Macri and A. J. Goerig and this plaintiff; set forth the payment of these judgments by the Defendant Continental Casualty Company and the assignment of these judgments and attorneys' fees by Defendant Continental Casualty Company to the Defendant Herman Howe, in which assignment the Defendant Continental Casualty Company attempted to limit its liability for making the assignment as part of the conspiracy referred to herein later.

XVII.

That the action in Idaho, above referred to, was settled by the defendant therein, A. J. Goerig, by his paying to the plaintiff therein, Herman Howe (a defendant herein), the sum of \$2,250.00 as a result of which an order was entered in such court dismissing the action, and in accordance therewith

a release in full signed by the defendants in this action, Sam Macri, Don Macri and Joe Macri and Herman Howe, was delivered to A. J. Goerig who had been a joint venturer with the Defendants Sam Macri, Don Macri and Joe Macri and this plaintiff.

XVIII.

That plaintiff is informed, and therefore alleges, that the said Sam Macri, Joe Macri and Don Macri sustained no loss whatsoever on said contracts covering Specifications No. 1062 and No. 1068, and actually realized a profit thereon, as will appear upon a true and correct accounting of said contracts being had, and further alleges that if the said Sam Macri, Joe Macri and Don Macri did sustain any loss on said contracts, the same was due and caused by the negligence and carelessness of said Sam Macri, Joe Macri and Don Macri in the performance thereof, by allowing the work to be unduly delayed without cause, improper workmanship and otherwise failing to meet the contractual obligations required under said contract.

XIX.

Plaintiff requested of Defendants Sam Macri, Joe Macri and Don Macri and Herman Howe and Continental Casualty Company, and of each of them, that he or it satisfy the judgments referred to herein.

XX.

These Defendants Sam Macri, Joe Macri and Don Macri, by and through their agent, Defendant

Herman Howe, are attempting to do indirectly that which they could not do directly, viz., compel this plaintiff to pay the costs and expenses of the joint venture between the Defendants Macri, on the one part, and A. J. Goerig and this plaintiff, on the other part, by virtue of the purchase of the judgments taken by Defendant Continental Casualty Company arising out of the operation of the joint venture, without these same parties to the joint venture first accounting to this plaintiff and A. J. Goerig in fraud of the contractual rights of the plaintiff, particularly since the Defendant Howe appears only as the agent of the Defendants Macri, and the Macri's acquired these judgments arising out of the joint venture at a percentage on the dollar, and the result of the enforcement of the collection of these judgments would result in the payment of one hundred per cent (100%) of the losses of the joint venture by this plaintiff, contrary to the agreement of the parties, at a profit to the Defendants Macri, even though the joint venture actually lost money.

XXI.

Should the Defendant Herman Howe prevail in Peru, the following inequitable results will prevail: If this plaintiff paid the judgments and attorneys' fees in full, as sought, and looked to A. J. Goerig for a contribution as a result of it, the plaintiff would be paying in full the judgment and attorneys' fees in the sum of \$87,828.81. A. J. Goerig would have available to him the defense, first, that there had been no accounting of the joint venture

between A. J. Goerig and Clyde Philp, on the one part, and between Sam Macri, Don Macri, Joe Macri, this plaintiff and A. J. Goerig, Second, that he, A. J. Goerig, had satisfied all his liability on these judgments by virtue of the release given him by these Defendants Herman Howe, Sam Macri, Don Macri and Joe Macri, leaving the plaintiff to pay in full the judgments with attorneys' fees in excess of \$87,000.00 without contribution, or right thereof, from any of the other joint venturers or partners and without credit for payments previously made, either voluntarily or involuntarily, by any partner.

XXII.

Should the Defendant Herman Howe be permitted to proceed to collect these judgments in Peru, he would be attempting to collect judgments and attorneys' fees in excess of \$87,000.00 on behalf of Sam Macri, Don Macri and Joe Macri, all of whom were joint venturers and copartners with this plaintiff; which same judgments plaintiff believes and alleges were purchased from the Defendant Continental Casualty Company by Sam Macri, Don Macri and Joe Macri from profits arising from the joint venture in which Sam Macri, Don Macri and Joe Macri and A. J. Goerig and this plaintiff were involved, and out of which these same judgments arose, which would be inequitable.

XXIII.

That the defendants, and each of them, should be restrained by this court from in any way prosecut-

ing an action against the Plaintiff Clyde Philp to collect on the judgments described herein, whether in the United States of America or in the country of Peru, without these Defendants Sam Macri, Joe Macri and Don Macri first making an accounting of the joint venture between the above-named defendants and A. J. Goerig and this plaintiff.

By Way of a Second Cause of Action This Plaintiff Complains of These Defendants, and Each of Them, as Follows:

I.

Plaintiff reaffirms paragraphs I to XXII, inclusive, as though they were fully set forth herein.

II.

Plaintiff alleges that the Defendant Continental Casualty Company has been furnishing surety bonds for and on behalf of all the defendants herein, except Herman Howe, before and since the date that the Defendant Continental Casualty Company assigned its various judgments, referred to herein, and has been making a profit from such action.

III.

This plaintiff alleges that the Defendant Continental Casualty Company assigned these judgments to the Defendant Herman Howe as part of a scheme to keep the custom and propitiate the Defendants Sam Macri, Joe Macri and Don Macri to the end that the Defendant Herman Howe would harass and

annoy the Plaintiff Clyde Philp wherever he could be found.

IV.

That at all times herein mentioned the defendants Sam Macri, Joe Macri, Don Macri, Continental Casualty Company and Herman Howe, and each of them, knew that there was an agreement terminating the joint venture between this plaintiff and A. J. Goerig and the defendants Macri, a copy of which termination agreement is attached hereto, as aforesaid, and knew that this plaintiff and A. J. Goerig were liable on such agreement for only fifty-two and one-third per cent ($52\frac{1}{3}\%$) of all loss sustained by the said Sam Macri, Joe Macri and Don Macri in the performance of the contracts covering specifications No. 1062 and No. 1068 when such loss, if any, is ascertained and determined under the conditions of said agreement.

V.

These defendants, as aforesaid, and each of them, knew that this plaintiff and A. J. Goerig had demanded of Sam Macri, Joe Macri and Don Macri that they, the defendants Macri, furnish an accounting of the receipts and disbursements on such contracts and these defendants further knew that the defendants Sam Macri, Joe Macri and Don Macri had failed and refused to furnish any accounting of their receipts and disbursements on the aforesaid contracts.

VI.

Plaintiff alleges that the defendants above named, Sam Macri, Joe Macri and Don Macri and Herman Howe on behalf of themselves and the communities of themselves and their respective wives and the Continental Casualty Company conspired together to harass and annoy this plaintiff Clyde Philp and instituted legal proceedings to compel him to pay one hundred per cent (100%) of the judgments originally satisfied by Continental Casualty Company, although all parties well knew that the liability of this plaintiff Clyde Philp could not exceed fifty-two and one-third per cent ($52\frac{1}{3}\%$) of such judgments.

VII.

These defendants, and each of them, further conspired to damage the credit and reputation of the plaintiff Clyde Philp in the territory and neighborhood where he is engaged in the general construction business, to wit, Lima, Peru, by contacting residents of Peru and advising them that the plaintiff was heavily indebted to these defendants, and giving an incomplete and derogatory view of such judgments and the facts surrounding the taking of them, and by instituting suit in Lima, Peru, in order to collect the total judgments referred to herein, all to plaintiff's damage.

VIII.

That in furtherance of the conspiracy between the defendants, these defendants caused Herman Howe to institute an action in Lima, Peru, on the

judgments which had been fraudulently nominally assigned to the defendant, Howe, although each defendant well knew that the courts of Peru and the courts of this nation were being asked to aid the defendants in their completion of an illegal act, namely, to compel plaintiff to pay one hundred per cent (100%) of the judgments to his partners and members of a joint venture because of alleged losses of joint venture and partnership, without there first being had an accounting of this joint venture and partnership, thus allowing the defendants to profit by their own wrong doing and misdeeds in the completion of the contracts of the partnership and joint venture and subsequent actions.

By Way of a Third Cause of Action This Plaintiff Complains and Alleges as Follows:

I.

Plaintiff reaffirms paragraphs I to XXII, inclusive, of his first cause of action and paragraphs I to VIII of the second cause of action as though fully set forth herein.

II.

That these defendants have slandered the plaintiff, his credits and reputation in Lima, Peru, where plaintiff is in business, by circulating in financial circles in that city the erroneous story that defendants would sue and did sue plaintiff because he did not pay his share of a joint venture and partnership, when in truth and effect these defendants well knew that plaintiff was being asked to pay more

than one hundred per cent (100%) of the alleged losses without these defendants giving an accounting and proving such losses took place.

III.

By such slanderous and illegal conduct of the defendants plaintiff has been damaged in the sum of one hundred thousand dollars (\$100,000.00).

IV.

That as a result of the acts of these various defendants the credit and reputation of this plaintiff, Clyde Philp, has been damaged in the sum of two hundred thousand dollars (\$200,000.00), as alleged in his second cause of action herein.

Wherefore this plaintiff prays that he have judgment against these defendants, and each of them, in his first cause of action for an order restraining them, and each of them, from bringing any action or prosecuting any judgment against this plaintiff which arise out of the assignment to Herman Howe by Continental Casualty Company of the judgments heretofore referred to taken in the United States District Court for the Eastern District of Washington, Southern Division, until these defendants, Sam Macri, Joe Macri and Don Macri, have furnished an accounting of their receipts and disbursements on contracts No. 1062 and No. 1068 of the Roza Division of the Yakima Project, Washington, and until further all liability can be determined by a court of proper jurisdiction.

This plaintiff further prays judgment on his second cause of action against the defendants, and each of them, for damages done to his character and credit in the sum of two hundred thousand dollars (\$200,000.00) by virtue of their unlawful and illegal prosecution of the attempted collection of the judgments recovered by Continental Casualty Company in the United States District Court for the Western District of Washington and which were subsequently assigned to Herman Howe, all to plaintiff's damage.

This plaintiff further prays that he have judgment against the defendants, and each of them, in his third cause of action for his damages in the sum of one hundred thousand dollars (\$100,000.00).

/s/ GRANVILLE EGAN,
Attorney for Plaintiff.

EXHIBIT A

Agreement Terminating Joint Ventures

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a copartnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a copartnership as Goerig & Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

(1) A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.

(2) Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.

(3) Contract No. 12r-14825, Spec. 1062, earth-work, pipe lines and structures, Laterals 69.3 to 69.8 and sublaterals and Diversion Channels. Roza Division, Yakima Project, Washington.

(4) Earthwork pipe lines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

(5) The work to be done on Project 9536, Contract W7412-eng-1, duPont RPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Sub-

contract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4) and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect

to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result 52⅓% thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

(2) As to Project (5), this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to receive all profits that may come, arise or grow in connection therewith, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same.

(3) Second parties shall pay to first party, as soon as the amount is ascertained, the equipment rentals for first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties

upon Project (5), as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on Project (5).

(4) In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project (1), known and designated as "Val Vue Real Estate Development."

(5) It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second parties upon Project (5) are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00, is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

(6) It is further agreed and understood that there are other joint ventures between the parties

hereto that are not mentioned herein, some of which have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified.

(7) It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

(8) It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in a spirit of

co-operation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such co-operation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

(9) In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties will sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, concurrently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,

By /s/ DON MACRI,
One of Said Firm, but Authorized to Act in This
Matter for it.
(First Party.)

/s/ CLYDE PHILP,

/s/ A. J. GOERIG,
Individually and d/b/a Goerig & Philp and/or A. J.
Goerig Construction Co.
(Second Parties.)

[Endorsed]: Filed February 21, 1957.

[Title of District Court and Cause.]

AMENDED MOTION TO DISMISS

Defendant Continental Casualty Company moves the Court as follows:

1. To dismiss the first cause of action because the complaint fails to state a claim against defendant Continental Casualty Company upon which relief can be granted.
2. To dismiss the second cause of action because the complaint fails to state a claim against defend-

ant Continental Casualty Company upon which relief can be granted.

3. To dismiss the third cause of action because the complaint fails to state a claim against defendant Continental Casualty Company upon which relief can be granted.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ WILLARD E. SKEEL,
Attorneys for Defendant Continental Casualty
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed April 8, 1957.

[Title of District Court and Cause.]

**MOTION OF DEFENDANTS JOSEPH MACRI
AND ELEANOR MACRI TO DISMISS**

The defendants, Joseph Macri and Eleanor Macri, his wife, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against these defendants upon which relief can be granted.

2. To dismiss the first cause of action set out in plaintiff's Complaint, because it fails to state a claim upon which relief can be granted.

3. To dismiss the second cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.
4. To dismiss the third cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.
5. To dismiss the action because the Complaint fails to set out a short and plain statement of the claim of plaintiff, as required by Rule 8 (a) (2) of the Rules of Civil Procedures.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Joseph Macri and Eleanor Macri, His Wife.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS SAM MACRI AND
PAULINE MACRI, HUSBAND AND
WIFE, AND DON R. MACRI AND KATH-
LEEN N. MACRI, HUSBAND AND WIFE,
TO DISMISS

The defendants, Sam Macri and Pauline Macri, husband and wife, and Don R. Macri and Kathleen N. Macri, husband and wife, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against these defendants upon which relief can be granted.
2. To dismiss the first cause of action set out in plaintiff's Complaint, because it fails to state a claim upon which relief can be granted.
3. To dismiss the second cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.
4. To dismiss the third cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.
5. To dismiss the action because the Complaint fails to set out a short and plain statement of the claim of plaintiff, as required by Rule 8 (a) (2) of the Rules of Civil Procedures.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Sam Macri and Pauline Macri, His
Wife, and Don R. Macri and Kathleen Macri,
His Wife.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

**MOTION OF DEFENDANTS HERMAN HOWE
AND VIOLA B. HOWE TO DISMISS**

The Defendants, Herman Howe and Viola B. Howe, his wife, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against these defendants upon which relief can be granted.
2. To dismiss the first cause of action set out in plaintiff's Complaint, because it fails to state a claim upon which relief can be granted.
3. To dismiss the second cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.
4. To dismiss the third cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.
5. To dismiss the action because the Complaint fails to set out a short and plain statement of the claim of plaintiff, as required by Rule 8 (a) (2) of the Rules of Civil Procedures.

**LYCETTE, DIAMOND &
SYLVESTER,**

Attorneys for Herman Howe and Viola B. Howe,
His Wife.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

MEMORANDUM DECISION AND ORDER

Defendant's motions to dismiss the complaint and each of the three alleged causes of action stated therein have been considered in the light of the various memoranda filed at the oral argument.

The complaint to some extent is violative of Rule 8(a)(2), F. R. Civ. P., requiring "a short and plain statement of the claim" and requires careful study for elimination of conclusions of law and other extraneous matter. On such reading of the complaint it appears that in his first cause of action plaintiff seeks a decree of this court restraining defendants from proceeding in the Peruvian courts to enforce a judgment previously obtained against plaintiff in a district court of the United States. Due to voluntary residence in Peru, as alleged in the complaint, plaintiff is subject to the jurisdiction of the courts of that country. From the record it appears that plaintiff has actively appeared in and thus far unsuccessfully contested the Peruvian lawsuit which he now prays this court to terminate by restraining defendants from further contesting plaintiff's appeal of that case now pending in an appellate court of Peru. In these circumstances the allegations of plaintiff's first cause of action do not state a claim showing plaintiff entitled to either equitable or legal relief.

Both plaintiff's second and third causes of action, while containing scattered, incidental allegations, in

ultimate substance charge defendants with malicious prosecution of a civil action. The law of the state of Washington, controlling in this diversity proceeding under Erie v. Tompkins, 304 U.S. 64, clearly forbids the assertion of a claim for damages under the facts alleged in plaintiff's complaint, there being no allegation of arrest of the person or attachment of the property of plaintiff or any other "special injury" not the necessary result of the lawsuit brought by defendants against plaintiff. Petrich v. McDonald, 44 Wn. 2d 211 (1954).

It therefore appears that neither the complaint as a whole, nor any of the three causes of action alleged therein, states a claim upon which relief can or ought to be granted. It is therefore

Ordered that plaintiff's complaint and each cause of action alleged therein be and the same hereby is dismissed.

Dated this 19th day of September, 1957.

/s/ GEO. H. BOLDT,

United States District Judge.

[Endorsed]: Filed and entered September 20, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Sam Macri and Pauline Macri, Husband and Wife; Joseph Macri and Eleanor Macri, Husband and Wife; Don R. Macri and Kathleen N. Macri, Husband and Wife; Continental Cas-

uality Company, a Corporation; and Herman Howe and Viola B. Howe, Husband and Wife; and Lycette, Diamond and Sylvester, Their Attorneys, and to the Clerk of the Court:

Please take notice that Clyde Philp, plaintiff herein, by and through his attorney, Granville Egan, hereby appeals to the Circuit Court of Appeals, Ninth District, from that certain judgment of the United States District Court for the Western District of Washington, Northern Division, filed in the Clerk's office September 20, 1957, which judgment dismisses the complaint of the plaintiff. Clyde Philp appeals from each and every part of said judgment.

Dated at Seattle, Washington, this day of October, 1957.

/s/ GRANVILLE EGAN,
Attorney for Clyde Philp,
Plaintiff and Appellant.

[Endorsed]: Filed October 18, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and

Rule 75 (1), FRCP, I am transmitting herewith the following original documents in the file dealing with the above action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed 2-21-57.
2. Bond for costs, Non-resident Plaintiff, filed 2-21-57.
3. Summons with Marshal's return thereon, filed 2-28-57.
4. Appearance for defendants Sam and Pauline Macri and Don and Kathleen N. Macri, by Josef Diamond, filed 3-1-57.
5. Appearance of Joseph Macri, et ux., by Josef Diamond, filed 3-1-57.
6. Appearance of Herman Howe, et ux., by Josef Diamond, filed 3-1-57.
7. Appearance of Continental Casualty Company by Willard E. Skeel, filed 3-11-57.
8. Motion Continental Cas. Co. to Dismiss, filed 3-15-57.
9. Amended Motion to Dismiss, filed 4-8-57.
10. Motion of Defendant Joseph Macri, et ux., to Dismiss, filed 4-22-57.
11. Motion Defendants Sam Macri, et al., to Dismiss, filed 4-22-57.
12. Motion Defendants Herman Howe, et ux., to Dismiss, filed 4-22-57.
13. Note for Hearing of Argument, filed 6-28-57.
14. Motion to Amend, filed by Plaintiff 7-17-57.
15. Note for Motion Docket, filed 7-17-57.

16. Marshal's return on Motion to Amend, filed 7-24-57.
 17. Memorandum of Authorities of Defendants on Motion to Dismiss, filed 8-9-57.
 18. Memorandum of Authorities on Behalf of Con. Cas. Company, filed 8-9-57.
 19. Memorandum of Plaintiff on Motion to Dismiss, filed 8-9-57.
 20. Memorandum Decision and Order, dismissing complaint, filed 9-20-57.
 21. Notice of Appeal, filed 10-18-57.
 22. Cost Bond on Appeal, filed 10-18-57.
 23. Stipulation between Clyde Philp and Con. Cas. Co., filed 11-1-57.
 24. Additional Designation of Record by Respondent Continental Casualty Company, filed 11-1-57.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for the Appellant.

In Witness Whereof I have hereunto set my hand
and affixed the official seal of said District Court at
Seattle this 25th day of November, 1957.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15798. United States Court of Appeals for the Ninth Circuit. Clyde Philp, Appellant, vs. Sam Macri, Pauline Macri, Joseph Macri, Eleanor Macri, Don R. Macri, Kathleen N. Macri, Herman Howe and Viola B. Howe, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15798

CLYDE PHILP,

Appellant,

vs.

SAM MACRI and PAULINE MACRI, Husband and Wife; JOSEPH MACRI and ELEANOR MACRI, Husband and Wife; DON R. MACRI and KATHLEEN N. MACRI, Husband and Wife; CONTINENTAL CASUALTY COMPANY, a Corporation; and HERMAN HOWE and VIOLA B. HOWE, Husband and Wife.

Respondents.

STATEMENT OF POINTS UPON WHICH
THE APPELLANT IS RELYING

1. That the court erred in holding that the plaintiff was not entitled to either equitable or legal relief in his first cause of action and in dismissing the first cause of action of the plaintiff; that the plaintiff is entitled to the equitable relief sought;
2. That the court committed error in dismissing plaintiff's second and third causes of action and in dismissing them for the reason that a legal cause of action is stated in each.

/s/ GRANVILLE EGAN,
Attorney for Appellant
Clyde Philp.

Receipt of copy acknowledged.

[Endorsed]: Filed October 28, 1957.

[Title of Court of Appeals and Cause.]

**ORDER OF DISMISSAL AS TO
CONTINENTAL CASUALTY COMPANY**

This Matter coming on this day before the undersigned Judge of the above-entitled Court for entry of this Order of Dismissal as to respondent Continental Casualty Company and based upon Stipulation signed by Granville Egan, attorney of record for appellant Clyde Philp, and signed by Willard E. Skeel, attorney of record for respondent Continental Casualty Company, stipulating that said appeal as to respondent Continental Casualty Company shall be dismissed and further stipulating that said cause of action and all three causes of action set forth in appellant's complaint as to Continental Casualty Company shall be dismissed with prejudice and without costs to any party, and the Court being otherwise fully advised in the premises, it is, therefore,

Ordered that appellant's complaint and each cause of action alleged therein as to Continental Casualty Company be and the same is hereby dismissed with prejudice and without costs, and it is further

Ordered that appellant's appeal in the above-entitled cause as to respondent Continental Casualty Company be and the same is hereby dismissed with prejudice and without costs.

Done this 22nd day of January, 1958.

/s/ ALBERT LEE STEPHENS,
Judge, United States Circuit Court of Appeals for
the Ninth Circuit;

/s/ WM. HEALY,

/s/ WALTER L. POPE.

Presented by:

/s/ WILLARD E. SKEEL.

Approved for entry 1-15-58.

/s/ GRANVILLE EGAN.

[Endorsed]: Filed January 24, 1958.

